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Supreme Court, U.S.
FILED
AUG 24 1971
E. ROBERT SEAVER, CLERK

No. 71-110

In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID GELBARD AND SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

Petitioner Parnas was summoned to appear on February 10, 1971, before a federal grand jury convened in the Central District of California. Prior to appearing, he became aware that certain conversations of his had been overheard during an electronic surveillance of the telephones of one Jerome Zarowitz. He then sought an order from the district court that he be furnished with all applications, orders, tapes and transcripts relating to the surveillance, which he claims he is entitled to under the wiretap provisions of the Omnibus Crime Control Act; and that his appearance before the grand jury be delayed until he could move to suppress any conversations of his that

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were overheard. At a hearing on these motions, it was disclosed that petitioner had been overheard during a court-authorized interception pursuant to 18 U.S.C. 2518(3) directed against Zarowitz. Counsel stated that the government intended to use the transcripts of the Zarowitz interceptions to refresh the witness's memory, if necessary.

On February 17, 1971, the district court denied petitioner's motions and ordered him to appear before the grand jury and testify, ruling that the motions were inappropriate in a grand jury context. Parnas subsequently appeared before the grand jury, but refused to answer questions concerning his occupation, his acquaintance with Zarowitz and one John Baborian, his knowledge of Zarowitz's ownership of Caesar's Palace in Las Vegas, Nevada, his activities as middleman for Zarowitz and Baborian in financial transactions, and his knowledge of Baborian's residence, on the ground that he was entitled before responding to challenge the validity of the means by which the information on which these questions were based was gathered. The district court ordered Parnas to answer the grand jury's questions, Parnas again refused, and the court adjudged him guilty of civil contempt and committed him to custody until he obeyed its order or the grand jury term expired.

The facts as to petitioner Gelbard are substantially the same. The district court overruled his motion for disclosure and, when he also refused its order to answer the grand jury's questions (concerning his occupation, his acquaintance with one Perry Paul and one Jerry Kilgore, his knowledge of Kilgore's business

activities, wagers placed on behalf of Kilgore and one Frank Rosenthal, and wagers placed with one Sam Farkas or one Anton Kaleel), the court adjudged him guilty of civil contempt and committed him to custody.

The court of appeals affirmed as to both petitioners (Pet. App.). It held that a witness before a grand jury "has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used" before the grand jury (Pet. App. 2), and concluded that the Omnibus Crime Control Act did not give the witness such a right.

On the basic issue whether a witness before a grand jury may refuse to answer questions on the ground that they are the product of illegal electronic overhearing of his own voice, the opinion below conflicts with the decisions of the courts of appeals for the District of Columbia Circuit in *In re Evans,* decided July 23, 1971, and for the Third Circuit in *In re Egan,* decided May 28, 1971, and *In re Walsh,* decided June 22, 1971. The government has filed petitions for writs of certiorari in those cases, *United States* v. *Evans, United States* v. *Fishlowitz,* filed August 20, 1971, No. 71-256; *United States* v. *Egan, United States* v. *Walsh,* filed August 20, 1971, No. 71-263. In the present case, the issue arises in a somewhat different context, since the government disclosed to each petitioner that he had been overheard during court-authorized wiretaps, and thus the precise issue is whether a grand jury witness may challenge the validity of an acknowledged wiretap before answering the grand jury's questions. While we think that the

court below correctly decided this case,[1] we suggest that the Court grant this petition and hear the case together with Nos. 71–256 and 71–263.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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[1] In our view, a witness before a grand jury is not a "party" and a grand jury investigation not a "trial, hearing or proceeding" under 18 U.S.C. 2518(10), so that a grand jury witness is not entitled to litigate the validity of the court-authorized wiretap before answering the grand jury's questions. The legislative history of Section 2518 supports this interpretation, as the court below noted (Pet. App. 3, n. 1).

U.S. GOVERNMENT PRINTING OFFICE: 1971